



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL OF KENYA**

**AT NAIROBI**

**Civil Appli 284 of 2005**

**ZEENAT MEGHJI .....APPLICANT**

**AND**

**LIFECARE INTERNATIONAL LTD .....RESPONDENT**

*(Application for stay of Ruling and Orders of the High Court of Kenya at Nairobi (Justice Ransley) dated 3<sup>rd</sup> October, 2005*

**in**

**H.C.C.C. NO. 843 OF 2005)**

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**RULING OF THE COURT**

We have before us an application by way of Notice of Motion stated to have been brought “***UNDER RULE 5(2)(B), 42 AND 43 OF THE COURT OF APPEAL RULES.*** In that application dated 19<sup>th</sup> October, 2005 the ***applicant, Zeenat Meghji,*** moved the Court for the following orders:-

- “1. THAT the Honourable Court be pleased to certify this application as URGENT and order that it be heard URGENTLY and on a priority basis.***
- 2. THAT the Honourable Court be pleased to stay the ruling and orders therein, dated 3<sup>rd</sup> October, 2005 by the Hon. Mr. Justice Philip Ransley, in High Court Civil Case No. 843 of 2005, Life Care International Ltd v. Zeenat Meghji – 1<sup>st</sup> Defendant and Andrew Grimes – 2<sup>nd</sup> Defendant.***
- 3. THAT the applicant be at liberty to apply for further and/or other directions or orders that the Honourable Court may deem fit and just to grant.***
- 4. THAT the costs of and incidental to this application do abide the outcome of the intended appeal.”***

That application was brought on the following grounds:-

- “1. THAT the ruling and orders in the certified copy of the ruling do not conform to the ruling as read out in Court.***
- 2. The said ruling was altered subsequent to delivery in Court when the judge was functus officio.***

3. *The said alterations were fundamental and not within the scope of section 99 of the Civil Procedure Code.*
4. *That in any event the said orders offend against the mandatory provisions of Orders XXXIX, Rules 3 (1) and (2) of the Civil Procedure Rules.*
5. *The orders are appealable on grounds as stated in the Draft Memorandum of Appeal annexed hereto.*
6. *That an appeal from the said ruling and the Orders, therein has overwhelming probability of success and if a stay applied for is not granted forthwith and as a matter of URGENCY the intended appeal will be rendered nugatory, and will seriously and adversely affect and indeed paralyze the business and consequently the livelihood of the 1<sup>st</sup> Defendant.”*

The genesis of this matter can be traced back to a plaint dated 30<sup>th</sup> June, 2005 filed by the **Life Care International Limited** (the respondent herein) against **Zeenat Meghji** (applicant herein) as 1<sup>st</sup> defendant and Andrew Grimes the 2<sup>nd</sup> defendant. In that plaint the respondent sought the following reliefs:-

- “(a) An injunction restraining the First Defendant whether acting by herself as self-employed or by her servants or agent, or in employment, partnership, conjunction or association with any other person or company including the said Planned Healthcare Limited or its directors, officers, servants or agents or otherwise howsoever, from carrying on or authorising or permitting to be carried on the trade or business of a health insurance agent or healthcare insurance factor, from consulting for, advising, or divulging any information, strategy or client information relating to the Plaintiff’s business to any company or corporation in direct competition with the Plaintiff or to any company within the healthcare industry, such injunction to remain in force for a period of two years from 1<sup>st</sup> March, 2005.*
- (b) An injunction restraining the First Defendant whether acting by herself or by her servants or agents or associates, from divulging or disclosing or permitting to be divulged or disclosed to any person or company whatsoever any knowledge, information including client information, trade data or other confidential matters relating to the Plaintiff’s business, or from exploiting the same to her or their own gain and advantage, or from soliciting any health insurance business from the Plaintiff’s customers and others or enticing them away from the Plaintiff or from committing any act whatsoever likely or calculated to constitute an unfair invasion of the Plaintiff’s business connections.*
- (c) An Order that the First Defendant do forthwith discover and supply to the Plaintiff by listing and verifying the same on oath the names and addresses of all persons or companies or organizations whose business the First Defendant has diverted or introduced to or placed or transacted with Allianz or any other healthcare insurer or healthcare insurance provider during the course of her employment with the plaintiff and thereafter with full particulars of the cover, dates, duration, the amounts involved and the commissions earned or to be earned thereon.*
- (d) An Order for an inquiry as to damages recoverable by the plaintiff or at the plaintiff’s option an account of all profits and payments received by the First Defendant or her associates on all businesses diverted or introduced to or placed or transacted with Allianz or any other healthcare insurer or healthcare insurance provider by or through or on behalf of the First Defendant, and payment over of the same with interest thereon to the Plaintiff.*
- (e) Damages, including aggravated damages, against the First Defendant and the Second Defendant jointly and severally.*
- (f) Any further or other relief as may seem just and expedient to this Honourable Court to grant.*
- (g) Costs of this suit with interest thereon at Court rates.”*

At the time of filing the said plaint, the plaintiff filed a Chamber Summons application stated to be **“Under Order 39 Rules 2, 2A, 3 and 9 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act Cap 21 Laws of Kenya and all Enabling Provisions of the Law.”**

In that Chambers Summons application the respondent (*as the plaintiff*) sought the following orders:-

**“1. THAT a temporary injunction be issued restraining the first defendant whether acting by herself as self-employed or by her servants or agents, or in employment, partnership, conjunction or association with any other person or company including Planned Healthcare Limited or its directors, officers, servants or agents or otherwise from carrying on or authorizing or permitting to be carried on the trade or business of a health insurance agent or healthcare insurance factor, from consulting for, advising, or divulging business to any company or corporation in direct competition with the plaintiff or to any company within the healthcare industry, until the final determination of this suit or until such further of this Honourable court.**

**2. That a temporary injunction be issued restraining the first Defendant whether acting by herself or by her servants or agents or associates, from divulging or disclosing or permitting to be divulged or disclosed to any person or company whatsoever any knowledge, information including client information, trade data or other confidential matters relating to the Plaintiff’s business, or from exploiting the same to her or their own gain and advantage, or from soliciting any health insurance business from the plaintiff’s customers and others or enticing them away from the plaintiff or from committing any act whatsoever likely or calculated to constitute an unfair invasion of the Plaintiff’s business connections.**

**3. That a temporary injunction also be issued restraining the 2<sup>nd</sup> Defendant from inducing, procuring and assisting and or continuing to induce, procure and assist the first Defendant to carry on the said business and her said activities which are in breach of her contractual obligations with and to the detriment and injury of the plaintiff until the hearing and determination of this suit.”**

That application was placed before Ransley, J. on 8<sup>th</sup> July, 2005 when he granted an ex parte order in terms of the prayers set out in the application pending inter partes hearing of the said application which was set for 22<sup>nd</sup> July, 2005. The matter came before Osiemo, J. on 22<sup>nd</sup> July, 2005 when he recorded a consent order that the matter be heard inter partes on the 26<sup>th</sup> July, 2005. He also extended the interim orders of Ransley, J. The application was, therefore, heard inter partes before Ransley, J. who after considering the rival submissions made before him came to the following conclusions in his ruling dated 3<sup>rd</sup> October, 2005.

**“I am of the view that the restraint clause relied on by the Applicant is not prima facie unreasonable. This is a matter for determination in due course, however.**

**In so far as it can be proved that the respondent has divulged confidential information to others this is a matter for damages in due course.**

**In respect of employment the restriction in the agreement restrains the Respondent for two years from being gainfully employed in any company in direct competition with the Applicant. This is not prima facie an unreasonable restriction to safeguard the applicant’s business. The courts have, however, not really enforced agreements, which stop a person from earning their living.**

**In this case I consider that it is reasonable to restrain the defendant from using information acquired by her in the Applicants employment and from soliciting the Applicant’s clients.**

**I therefore issue an injunction in the terms of prayers 1 and 2 of the application.”**

As can be seen at the commencement of this ruling, it is that ruling of 3<sup>rd</sup> October, 2005 by Ransley, J. that the applicant herein is asking this Court to order a stay.

It is now settled that the jurisdiction exercisable by this Court under **rule 5(2)(b)** of the Court of Appeal Rules is original and discretionary. For an applicant such as the one before us to succeed must satisfy the twin guiding principles that the intended appeal is not frivolous or is arguable and that unless a stay or injunction is granted, the appeal or intended appeal, if successful, would be rendered nugatory – See **GITHUNGURI V. JIMBA CREDIT CORPORATION LTD. (NO.2)** [1988] KLR 838, **J.K. INDUSTRIES LTD V. KENYA COMMERCIAL BANK LTD** [1982-88] 1 KAR 1088 and **RELIANCE BANK LIMITED (IN LIQUIDATION) V. NORLAKE INVESTMENTS LIMITED** – Civil Application No. NAI. 193 of 2002 (unreported).

In opening his address, Mr. Rao, for the applicant, submitted that the learned Judge had granted orders 2 and 3 of the application which he subsequently altered to read 1 & 2. In Mr. Rao’s view, that alteration of the orders granted was sufficient to negate those orders. Mr. Nyaoga, for the respondent, argued that the prayers in the ruling were not altered and that prayer 3 which related to 2<sup>nd</sup> respondent had been withdrawn. In his view, there were enough reasons for the superior court to grant the orders.

We remind ourselves that we are dealing with an application under **rule 5(2)(b)** of the Rules and that the ruling of the superior court was pursuant to an application under **Order XXXIX** of the Civil Procedure Rules. We must also remember that the main suit is yet to be heard and determined by the superior court. But there is an appeal against the ruling of 3<sup>rd</sup> October, 2005 delivered by Ransley, J. In that ruling, the learned Judge expressed himself thus:-

***“In any case what has to be shown at this stage is that prima facie an agreement exists which is likely to be breached or some property which the applicant has, is likely to be damaged or alienated or the same is to be disposed of and it is equitable to grant an interlocutory order.***

***In this case the Applicant has shown that prima facie the Respondent has undertaken not to do the things contained in the said agreement. The restriction is for a period of two years and forbids the Respondent being employed by any Company competing with the Applicant nor divulging confidential information to the same.”***

On our part, we have carefully considered what has been urged before us and while we cannot declare the applicant’s intended appeal as frivolous, we are unable to see how the intended appeal would be rendered nugatory if we refused to accede to this application. We restrain ourselves from saying anything more lest we prejudice the hearing of the main suit in the superior court and the intended appeal in this Court.

For the foregoing reasons, we refuse to grant the orders sought and accordingly order that the applicant’s application to this Court dated 19<sup>th</sup> October, 2005 is hereby dismissed with costs to the respondent.

***Dated and delivered at Nairobi this 17<sup>th</sup> day of March, 2006.***

***E.O. O’KUBASU***

.....

***JUDGE OF APPEAL***

***E.M. GITHINJI***

.....

***JUDGE OF APPEAL***

***W.S. DEVERELL***

.....

**JUDGE OF APPEAL**

*I certify that this is  
a true copy of the original.*

**DEPUTY REGISTRAR**